BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID JOE EDWARDS	)	
Claimant	)	
VS.	)	
	)	Docket No. 198,017 & 198,018
KLEIN TOOLS, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appealed the July 30, 1997, Appeals Board Order to the Court of Appeals of the State of Kansas. In an opinion filed on January 29, 1999, the Court of Appeals reversed and remanded with directions to the Appeals Board.[1] The Appeals Board heard oral arguement on May 26, 1999.

APPEARANCES

Claimant appeared by his attorney, Timothy A. Short of Pittsburg, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Wade A. Dorothy of Lenexa, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Special Administrative Law Judge's February 25, 1997, Award.

ISSUES

Special Administrative Law Judge William F. Morrissey entered an Award in this matter on February 25, 1997. He found claimant injured his low back in a May 18, 1994, work-related accident. As a result of the low-back injury, the Special Administrative Law Judge awarded claimant 29.29 weeks of temporary total disability compensation and permanent partial general disability compensation based on a 33.5 percent work disability.

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[1] *See* Edwards v. Klein Tools, Inc., 25 Kan. App. 2d 879, 974 P.2 609 (1999).

Claimant appealed the Award to the Appeals Board. The only issue before the Appeals Board was the nature and extent of claimant's disability. Specifically, the claimant argued that the Special Administrative Law Judge erred in using an imputed post-injury average weekly wage instead of claimant's actual earnings to calculate the wage loss component of the work disability test. On July 15, 1996, over two years following claimant's May 18, 1994, accident, respondent offered claimant a job as a grinder earning $362 per week. At that time, claimant had been working at a service station for over a year performing light mechanic work with actual earnings of $240 per week.

Although claimant refused to even attempt to perform the grinding job offered by the respondent, claimant argued his refusal was reasonable because he had been successfully employed for over a year, had negotiated an option to buy his employer's service station after his employer retired, and the grinding job offered by the respondent was temporary.

Claimant requested the Appeals Board to find he had an actual wage loss of 73 percent instead of 50 percent as found by the Special Administrative Law Judge. Therefore, claimant argued he was entitled to a 45 percent work disability found by averaging a work task loss of 17 percent with the 73 percent actual wage loss.

Claimant had originally filed two separate docketed claims. Docket No. 198,017 alleged a June 27, 1994, accident date. Docket No. 198,018 alleged a May 18, 1994, accident date. The Special Administrative Law Judge found that the award should be computed based on one accident and the appropriate accident date was May 18, 1994. Neither party appealed that finding.

In a July 30, 1997, Order, the Appeals Board affirmed the Special Administrative Law Judge's Award. From that Order, the claimant appealed to the Court of Appeals. On appeal, claimant argued the Administrative Law Judge and Appeals Board erred in imputing to the claimant the average weekly wage of the grinder's job offered by the respondent. Claimant argued the Administrative Law Judge and the Appeals Board should have used the actual wages he was earning at the service station to determine the wage loss component of the work disability test. Claimant also, for the first time on appeal, argued the Appeals Board erred in the method used to compute the Award under the "new act" which was effective July 1, 1993.[2]

The Court of Appeals reversed and remanded the case to the Appeals Board with the following directions:

> On remand, the Board should calculate Edwards' average weekly wage by considering the number of weeks unemployed, the number of weeks working

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[2]*See* K.S.A. 44-510e.

> at the service station before the job offer, and the number of weeks working [sic] at the imputed wage once the job was offered.[3]

On remand, the claimant argues he declined respondent's grinder job offer in good faith. Accordingly, the claimant contends, since he was working and did not act in bad faith, the policy considerations, as announced in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), do not apply. Therefore, claimant's actual post-injury earnings should be used in computing the wage loss component of the work disability test instead of imputing the weekly wage of the offered grinder job. Further, the claimant asserts, in computing an award under the "new act", a change in the injured worker's wage loss, whether actual or imputed, changes the percentage of permanent partial general disability. Claimant contends the percentage of permanent partial disability before the change should be multiplied by the actual weeks claimant suffered that level of disability. Those weeks should then be credited againt the total number of disability weeks and the new percentage of permanent partial disability should be applied to arrive at the number of weeks to be paid or payable at the new disability rate.

Respondent, on the other hand, argues the weekly wage of respondent's grinding job offered to claimant on July 15, 1996, should be imputed to claimant as of that date. The respondent asserts that claimant could have preformed the grinding job within his permanent restrictions. Accordingly, respondent contends claimant did not act in good faith when he declined to even attempt the grinding job and, therefore, the $362 grinding job weekly wage should be imputed in computing the wage loss component of the work disability test.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board makes the following findings and conclusions:

Should claimant's wage loss be based on an imputed wage or his actual earnings?

The Court of Appeals held the Appeals Board's reliance on Foulk in this case was misplaced. The Court of Appeals found the Appeals Board erred in neglecting to consider the following evidence contained in the record: (1) claimant accepted the service station job after respondent refused to offer him a light duty job; (2) claimant had worked at the service station job for over a year before respondent offered claimant a job within his work restrictions; (3) the job offer was made only a short time before the regular hearing and after almost all the discovery had been completed; (4) the grinding job was temporary; and (5) lay offs were planned at the plant and that the die production work would be transferred to another plant.

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[3]25 Kan. App. 2d at 882.

The Appeals Board respectfully disagrees with the Court of Appeals' finding that it neglected to consider the evidence mentioned in the preceding paragraph. The Appeals Board submits it did consider that evidence and the Court of Appeals simply had a difference of opinion on the interpretation and the weight to be given that evidence. The Appeals Board in its Order found claimant, after he was released for light duty work on March 15, 1995, had obtained work earning $240 per week. The Appeals Board also found that respondent did not offer claimant a job within his restrictions until it offered claimant the grinding job on July 15, 1996. The Appeals Board's Order also noted claimant's argument that the offered grinding job was only a temporary job because the die shop was being transferred to Chicago and all employees in the die shop would be laid off. But the only evidence in the record concerning that issue was the testimony of respondent's plant manager. After reviewing his testimony, the Appeals Board found it did not support claimant's argument.

The Appeals Board interprets the Court of Appeals reversal of its Order to mandate that the wage loss component of the work disability test should be computed using claimant's $240 actual weekly earnings at the service station instead of imputing the $362 weekly wage of respondent's offered grinder job. When claimant's $876.86 pre-injury average weekly wage is compared with the $240 post-injury average weekly wage, claimant has a 73 percent wage loss. Accordingly, as required by statute, the 17 percent work task loss is averaged with the 73 percent wage loss, entitling claimant to a 45 percent work disability.[4]

The calculation of claimant's post-injury average weekly wage from the date of accident until he returned to work.

The Court of Appeals also determined that the Appeals Board should have considered the entire time period between claimant's last injury and respondent's grinder job offer in calculating claimant's average weekly wage. On remand, the Court of Appeals directed the Appeals Board to calculate claimant's average weekly wage by considering the number of weeks unemployed, the number of weeks working at the service station before the respondent's job offer, and the number of weeks working at the imputed wage once the job was offered.

The Appeals Board interprets the Court of Appeals' request for calculation of claimant's average weekly wage as referring to his post-injury average weekly wage and not his pre-injury average weekly wage. The Special Administrative Law Judge's finding in regard to claimant's pre-injury average weekly wage was not appealed by either party.

The Appeals Board respectfully disagrees with the Court of Appeals' finding that it did not consider the entire period between claimant's last injury and respondent's grinder job offer in calculating claimant's post-injury average weekly wage. The Appeals Board noted in its Order that claimant's disability rate changed during certain periods of time after the May 18, 1994, accident date. But this case involved a post-July 1, 1993, accident, where the

[4] *See* K.S.A. 44-510e(a).

disability rate is applied to the number of disability weeks instead of the weekly compensation rate, and in this case, the total amount of the award remains the same regardless of the disability rate change. The Appeals Board affirmed the Award as computed by the Special Administrative Law Judge without setting out the disability rate changes because those changes had no effect on the total Award.

The problem that arises in this case and that has arisen in other workers compensation cases since July 1, 1993, the effective date of the "new act", concerns the method to follow in computing an award when the claimant's percentage of permanent partial general disability changes from one period to another. The "old act" determined claimant's entitlement to permanent partial general disability benefits by multiplying the average weekly wage claimant was earning at the time of injury by the percentage of permanent partial general disability and then by multiplying the result by 66 2/3 percent. This weekly compensation rate was subject to the maximum as provided for in K.S.A. 44-510c and amendments thereto. The weekly compensation rate was paid for a period not to exceed 415 weeks after the date of injury subject to review and modification of the award.[5]

The "new act" which was effective July 1, 1993, made a major change in computing an award. Instead of multiplying the percentage of permanent partial general disability times the average gross weekly wage claimant was earning at the time of injury, the "new act" provides that the percentage of permanent partial general disability is multiplied by the number of disability weeks payable after subtracting from 415 weeks the total number of weeks of temporary total disability compensation paid, but the first 15 weeks of temporary total disability compensation paid are excluded. The weekly compensation rate is determined by multiplying the average weekly wage of claimant before the injury by 66 2/3 percent, subject to the maximum as provided for in K.S.A. 44-510c.[6]

On appeal to the Appeals Board, the claimant did not question the computation of the Award. In fact, in claimant's brief to the Appeals Board, claimant computed the award the same as the Special Administrative Law Judge except he used a 45 percent work disability instead of 33.5 percent. Claimant computed the award based on the 29.29 weeks of temporary total disability, as found by the Special Administrative Law Judge, at the rate of $313 per week or $9,167.77, followed by 180.32 weeks (415 weeks - 14.29 weeks TTD = 400.71 weeks x 45%) of permanent partial general disability at $313 per week or $56,440.16 for a total award of $65,607.93.

Then before the Court of Appeals, claimant raised the computation of the award arguing that the Appeals Board erred in affirming the method used by the Special Administrative Law Judge. In his brief before the Court of Appeals, claimant argued that if the grinder job average weekly wage is imputed, then for the period of weeks before the

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[5] *See* K.S.A. 1992 Supp. 44-510e(a).

[6] *See* K.S.A. 44-510e(a)

grinder job was offered on July 15, 1996, the percentage of permanent partial general disability should be multiplied by the actual weeks claimant suffered that level of disability. Those number of weeks should then be credited against the total number of disability weeks and a new percentage of permanent partial general disability should be applied to arrive at the number of weeks to be paid or payable at the new permanent partial disability rate. But if the grinder job's wage was not imputed, the claimant argued the award should be computed by the same method as the claimant presented in his brief to the Appeals Board using a 45 percent work disability.

On remand, the claimant argues the Court of Appeals implicitly approved his method of computing an award under the "new act". Claimant also argues he is entitled to a work disability based on a 100 percent wage loss from the date he was no longer receiving temporary total disability compensation until he started working at the service station. But claimant fails to identify the date either of those events took place. In respondent's brief to the Appeals Board on remand, it references May 24, 1995, as the date claimant started working for the service station. But the respondent does not cite where this date is found in the record and a search of the record fails to disclose it.

The claimant testified he started to work part time at the service station after he was released for light duty work by David O. King, D.O. Dr. King's records indicate that occurred on March 15, 1995. Claimant also testified he was receiving unemployment benefits while he was working part time at the service station. The Special Administrative Law Judge found claimant was entitled to 29.29 weeks of temporary total disability compensation. Claimant's last day worked for the respondent was September 8, 1994, and 29.29 weeks from that date is April 1, 1995. Thus, the Appeals Board concludes the record establishes that claimant was employed, working for the service station, at the time he was no longer entitled to temporary total disability compensation. Accordingly, from claimant's May 18, 1994, accident date until claimant was actually earning $240 per week at the service station, claimant was either working for respondent at a comparable wage or was being paid temporary total disability compensation.

Based on the record and in accordance with the Appeals Board interpretation of the "new act" computation method, the Appeals Board has set out below claimant's entitlement to permanent partial general disability benefits for the weeks between his May 18, 1994, accident and the date claimant started working for the service station on April 1, 1995.

(1) From May 19, 1994, the day after claimant's May 18, 1994, accident date until September 8, 1994, claimant's last day worked, claimant was working for the respondent earning a comparable wage. Therefore, during that 16.14 week period, claimant was entitled to permanent partial general disability benefits based on the stipulated 10 percent functional impairment.[7] Claimant's average weekly wage qualifies him for the maximum workers compensation rate on the date of his accident in the amount of $313 per week. The number

[7] *See* K.S.A. 44-510e(a).

of disability weeks payable is found by subtracting from 415 the total number of temporary total compensation weeks paid, excluding 15 weeks of temporary total compensation paid. In this case, 29.29 weeks of temporary total disability compensation were awarded claimant, and when 15 weeks are excluded, the number of disability weeks payable amounts to 400.71. The 10 percent permanent partial disability is then multiplied by the 400.71 disability weeks or 40.07 weeks. But claimant is only entitled to the 10 percent permanent partial disability for 16.14 weeks because he left work on September 8, 1994, as the result of his injuries. Therefore, claimant's total award for this period is 16.14 weeks of permanent partial disability times the $313 weekly compensation rate or $5,051.82.

(2) For the period from September 9, 1994, through April 1, 1995, which is 29.29 weeks claimant was temporarily and totally disabled. Therefore, he is entitled to an award for this period computed on the 29.29 weeks times $313 per week or $9,167.77.

(3) Thereafter, commencing April 2, 1995, claimant had actual earnings of $240 per week for a 73 percent wage loss averaged with a 17 percent work task loss resulting in a work disability of 45 percent. Therefore, the 400.71 disability weeks are multiplied by the 45 percent permanent partial disability, which equals 180.32 weeks. Because the "new act" requires the disability weeks to be multiplied by the percent of permanent partial disability, the number of weeks previously paid or payable are required to be credited from the disability weeks determined by the new percent of permanent partial disability. In this case, the credit is the 16.14 disability weeks as determined above. Subtracting 16.14 weeks from 180.32 weeks equals 164.18 weeks which are then multiplied by $313 per week or $51,388.34.

As noted above, the record does not support a finding that claimant had a period of weeks where he suffered a 100 percent wage loss before he started working for the service station. Therefore, the only change in claimant's percentage of permanent partial disability was from 10 percent while he remained at work at comparable wage to 45 percent when he started working for the service station.

If the award was calculated based on the method advocated by the claimant, the 16.14 disability weeks awarded claimant, while he worked at a comparable wage, would have been reduced to 1.61 weeks (10% x 16.14 weeks). The 1.61 disability weeks would have been credited against the 400.71 disability weeks for 399.10 weeks. Those 399.10 weeks would have been multiplied times claimant's 45 percent permanent partial general disability for a permanent partial disability award of 179.60 weeks. The 179.60 disability weeks would then have been multiplied by the $313 weekly compensation rate or $56,214.80. The total award would have been $65,886.50 compared to the $65,607.93 award computed above.

Claimant does not cite any statute, case, or treatise as authority for this computation method. The Appeals Board finds the claimant's proposed method of computing an award under the "new act" does not comply with the formula set out in the statute. The statutory formula does not provide that at the time a worker's percentage of permanent partial

disability changes that the worker, because of the change, is only entitled to a percentage of the actual number of calendar weeks the worker suffered the level of permanent partial disability before the change.

The method utilized by the Appeals Board in computing an award under the "new act" is consistent with the requirements of the statute. This method has also been addressed and approved in two Court of Appeals cases decided before the opinion in this case.[8] Under the Appeals Board's computation method, a change in the percentage of permanent partial disability results in a recalculation of the award using the new percentage. The new percentage of permanent partial disability is applied to the disability weeks payable. The disability weeks payable remain a constant number because the statute requires those weeks to be determined first by subtracting the temporary total disability weeks paid, excluding 15 weeks, from 415 weeks (the maximum number of weeks that permanent partial disability benefits can be paid under the Act). The new percentage of permanent partial disability, in effect, is a new ceiling on permanent partial disability benefits because a credit has to be given for all weeks previously paid or payable under the prior permanent partial disability percentages. The credit must be given because the disability percentage is applied to the disability weeks payable and those weeks are limited to 415. If a credit was not given then the claimant could, under certain circumstances, be paid more weeks than what the statute allows.

In summary, the Appeals Board disagrees with the contention of the claimant that the Court of Appeals' opinion and directions on remand approved his proposed method of computing an award under the "new act". The Appeals Board also, for the reasons stated above, rejects claimant's proposed computation method under the "new act".

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that its July 30, 1997, Order, as reversed by the Court of Appeals should be, and is hereby, modified to award a 45% work disability based upon a 73% wage loss and a 17% work task loss commencing on April 2, 1995.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, David Joe Edwards, and against the respondent, a qualified self-insured, Klein Tools, Inc., for an accidental injury which occurred May 18, 1994, and based upon an average weekly wage of $876.86.

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[8] *See* Wheeler v. Boeing Co., 25 Kan. App. 2d 632, 967 P.2d 1085 (1998), *rev. denied* _____ Kan. _____(1999); and Bohanan v. U.S.D. No. 260, 24 Kan. App. 2d 362, 947 P.2d 440(1997).

Claimant is entitled to 29.29 weeks of temporary total disability compensation at the rate of $313 per week or $9,167.77, followed by 16.14 weeks of permanent partial disability compensation at the rate of $313 per week or $5,051.82 for a 10% permanent partial functional disability, followed by 164.18 weeks at the rate of $313 per weeks or $51,388.34 for a 45% permanent partial work disability, making a total award of $65,607.93.

As of August 31, 1999, the entire award is due and owing less any amounts previously paid.

All remaining orders contained in the Award are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of August 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy A. Short, Pittsburg, KS
Wade A. Dorothy, Lenexa, KS
Bryce D. Benedict, Administrative Law Judge
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director